Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1095

BANKERS LIFE AND CASUALTY COMPANY

Petitioner,

v.

PALM BEACH BILTMORE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Bankers Life and Casualty Company respectfully prays that this Honorable Court issue a writ of certiorari to the United States District Court for the Southern District of Florida in Case Number 74-1096 seeking review of an Order of that Court (Peter Fay, D.J.). The District Court's Order granted Summary Judgment and Final Judgment to Respondent and ordered Petitioner to pay over

to Respondent the sum of two hundred and fifty thousand dollars ($250,000). This case presents an important question of the interpretation of the Federal Rules of Civil Procedure concerning summary judgment.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Florida granting Summary Judgment and Final Judgment was entered December 17, 1974 (see Appendix A). The order of the United States Court of Appeals for the Fifth Circuit affirming the District Court's judgment was issued July 17, 1975 (see Appendix B) and the Court's order denying rehearing and/or rehearing *en banc* was entered November 3, 1975 (see Appendix C).

JURISDICTION

The order of the Court of Appeals denying rehearing and/or rehearing *en banc* was entered November 3, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Did the District Court err in violation of Rule 56(c) of the Federal Rules of Civil Procedure by granting Respondent's Motion for Summary Judgment without any hearing held thereon as required by that rule.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that the federal government cannot act without providing due process of law.

Due process of law involved adherence to valid procedural requirements. The pertinent federal rule here involved, and, Petitioner asserts, not followed, is Rule 56(c) of the Federal Rules of Civil Procedure which provides for hearing on summary judgment motions as follows:

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. . .

STATEMENT OF THE CASE

This case involves a contractual dispute between Petitioner (hereinafter also sometimes referred to as "Seller") and Respondent (hereinafter also sometimes referred to as "Purchaser"). Respondent (Plaintiff below) sought the return of two hundred and fifty thousand dollars ($250,000) deposited with Petitioner in connection with the sale of certain real estate property owned by Petitioner. The facts are these:[1] In August, 1973, the Respondent-Purchaser's predecessor-in-interest (Charles C. Barton) entered into a written contract with the Petitioner to purchase a hotel prop-

[1] See Appendix A.

erty from Petitioner for five million dollars ($5,000,000.00). Included in the real estate to be sold were two lots which, under the contract, Petitioner was obligated to convey. The parties were aware that there was a lease on the lots (Mr. T's Lease) and the Purchaser acknowledged that he was aware of the lease, that the lease was in default, and that the premises were being operated by a court-appointed Receiver. Under the contract, the Petitioner-Seller agreed "to take such steps as are necessary to cause the lease to be judicially determined to be terminated by a court of competent jurisdiction." If the Seller "shall not accomplish this by sixty (60) days prior to the date of closing . . . then the Purchaser, at his sole option may terminate this agreement and the Seller shall refund to the Purchaser all sums paid to it by the Purchaser and the Purchaser shall thereafter have no further interest in the property."

The date of closing was to be March 8, 1974. A down payment of one hundred thousand dollars ($100,000) was paid by the Purchaser to the Petitioner-Seller.

The 60-days allowed the Seller within which to accomplish the judicial termination of the lease expired on January 8, 1974. As of that time there was no express judicial determination concerning the lease, nor did the Purchaser exercise its option as of January 23, 1974 to terminate the contract.

On January 23, 1974 the Purchaser and Respondent entered into a written contract extending the closing date to June 8, 1974, provided that the Purchaser pay to the Seller an additional one hundred and fifty thousand dollars ($150,000), which was done, making the total down payment the two hundred and fifty thousand dollars ($250,000) involved in the instant suit.

On March 29, 1974, Respondent-Seller caused a title insurance commitment or binder to be sent to the Purchaser showing the encumbrance of the lease on the two lots. The Contract of Sale had stipulated that within ten (10) days after the delivery of the title commitment

> . . . Purchaser shall notify Seller whether any of them (encumbrances), as to which Purchaser is not obligated to take subject under the provisions of this contract, constitutes an objection to title. If Purchaser does not assert such objection, Purchaser shall take title subject to all of them set forth in such binder . . .

Approximately one week prior to the June 8 closing date, Respondent notified Petitioner-Seller that it had purchased the Purchaser's interest in the contract, and further asserted that since the Respondent-Seller had not complied with the contract because Seller had "failed to take such steps as are necessary to cause the lease to be judicially determined to be terminated by a Court of competent jurisdiction by 60-days prior to the Closing Date," it was exercising its option to terminate the contract and it demanded return of the two hundred and fifty thousand dollar ($250,000) down payment.

On the Closing Date (June 8, 1974) Respondent-Seller appeared at the time and place of Closing with the appropriate closing papers, declared itself ready, willing and able to consummate the sale, and indicated that the title company was prepared to insure the Purchaser free of the exception concerning the lease, but the Purchaser did not appear. The Respondent-Seller thereupon advised the Purchaser that the Purchaser had defaulted and claimed the

two hundred and fifty-thousand dollar ($250,000) down-payment as liquidated damages.

Thereafter the Respondent-Purchaser filed suit in the state court to recover back the two hundred and fifty thousand dollars ($250,000), and for additional damages. The matter was removed to the Federal District Court and pre-trial matters undertaken, including the preparation of a pre-trial stipulation. As part of that stipulation it was agreed that among the issues of fact to be tried was whether the Plaintiff's exercise of its option to terminate was timely and/or whether the Purchaser had waived its option to terminate.

On the same date upon which counsel held their pre-trial meeting (November 22, 1974), Plaintiff served and filed a "Motion For Partial Summary Judgment," which it later described in the following words (R. 261):

> . . . just a partial summary judgment as to whether or not the lease had been judicially terminated. . .

This Motion for Partial Summary Judgment was never noticed, calendared or set down for hearing.

On December 3, 1974 the parties appeared for a pre-trial conference at 8:30 a.m., to be followed by a jury trial at 9:00 a.m. Because Respondent's president was in attendance at a state court trial in another city on that date, the trial date itself was ultimately continued to the calendar of December 16. At the pre-trial conference the Court, *inter alia*, requested (R. 267): "What is there factually for the jury to try?," to which counsel replied that there remained for jury trial (*ibid*): "The defense of waiver of the right to terminate" which Defendant alleged, was demonstrated by various facts.[2]

The pre-trial conference concluded with the Court expressing doubt as to whether or not it would submit the cause to the jury, indicating his belief that he should handle the cause as a matter of law (R. 290-292), but granting leave to the parties to submit further material.

No jury trial was ever held because on December 17, 1974, the Court entered its "Order Granting Summary Judgment and Final Judgment," a money judgment for two hundred and fifty thousand dollars ($250,000) in favor of the Respondent and against Petitioner. In short, the District Court granted full (not partial) summary judgment, although not even the Motion for Partial Summary Judgment had been scheduled for hearing.

After an unsuccessful request by Petitioner to the District Court to set aside and vacate the judgment, Petitioner appealed the District Court's Order to the Court of Appeals urging, *inter alia*, that the District Court had committed reversible and prejudicial error by granting the request for summary judgment without providing Defendant a hearing and/or oral argument on the Motion for Summary Judgment which was required by Rule 56 of

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[2] Among these facts were the failure of Respondent to show up at the Closing, the failure to file any objections to the title binder as required by the contract (R. 267), the failure to timely exercise the option by January, 1974, but instead entering into a contract extending the closing date (R. 277-279), and the fact that on the date of the aborted closing there were telephone conversations which indicated that the Respondent was "still looking for the money to close with and nobody at any time raised any point of this lease" (R. 287). This latter point, Respondent's counsel alleged, would be shown at the trial (see, e.g., R. 287-288).

the Federal Rules of Civil Procedure.[3] On July 17, 1975, the Court of Appeals affirmed the District Court without opinion, under local Rule 21, and ordered that the affirmance not be published. Respondent unsuccessfully requested rehearing *en banc.*[4] Further, on November 25, 1975 the Court of Appeals refused to stay the mandate of its affirmance pending the filing of a Petition for Certiorari in this Court. On December 22, 1975 this Court (per Justice Powell, Jr.,) denied Petitioner's request for stay of execution of judgment.

ARGUMENT

The District Court here ignored the plain wording of Rule 56 of the Federal Rules and never afforded Petitioner the hearing on the Motion for Summary Judgment which the Rules, properly interpreted, require.

Rule 56 of the Federal Rules of Civil Procedure clearly indicate that summary judgment cannot be granted without a hearing. Subsection (c) of Rule 56 specifically provides (italics supplied):

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before *the time fixed for the hearing.* The adverse

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[3] On January 27, 1975 the District Court stayed execution and enforcement of its judgment pending determination of the Respondent's appeal, on condition that Respondent file an approved supersedeas bond of $300,000, which was done.

[4] A copy of the Fifth Circuit *per curiam* affirmance is attached, as is a letter of November 3, 1975 denying Petitioner's request for rehearing and/or rehearing *en banc.*

> party prior *to the day of hearing* may serve opposing affidavits . . .

Both the 9th Circuit (*Dredge Corporation v. Penny,* 338 F.2d 456 (1964)) and the 8th Circuit (*Twin Cities Federal Savings and Loan Assn. v. TransAmerica Ins. Co.,* 491 F.2d 1122 (1974)) have made it clear that summary judgment, in the absence of proper hearing thereon is improper.

This is true even if, as is the case in Florida, the local rules in general allow the Court to act upon motions without hearing if the Court so desires,[5] because the local rules of particular District Courts cannot override the plain mandate of Rule 56(c) of the Federal Rules of Civil Procedure which require notice, argument and hearing in the case of summary judgment on the merits. See *Dredge Corp. v. Penny, supra.*

Nor can, as the District Court and Respondent apparently believe, the pre-trial conference be used as a substitute for the hearing required by Rule 56(c). Although the pre-trial conference is an important step in clarifying the issues to be tried, it is not (nor should it be presumed to be) an opportunity for the introduction of testimony through affidavits or otherwise which is appropriate in a summary judgment hearing. At most it is a proceeding which might properly precede an oral argument on the merits but, as the 8th Circuit recognized in *Twin City Federal Savings and Loan Assn., supra,* it is not an appropriate substitute:

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[5] Rule 10 of the local rules for the Southern District of Florida specifically states (Rule 10(b)) that "no hearings will be held on motions unless set by the Court." Thus, the local rules provide no method by which a party opposing a motion for summary judgment may request oral argument.

> Although a district court may assist through pre-trial proceedings in sharpening the issues, *a court may not pose the issue and then proceed to decide the same without a motion for summary judgment.* Twin City argues that the district court should be deemed to have treated the submission as a motion for summary judgment. This may have been the intention of the district court, but, if so, it was error. Rule 56 provides for the service of the motion for summary judgment, an opportunity for service of opposing affidavits and a hearing. Fed. R. Civ. P., Rule 56, 28 U.S.C.

To the same effect see *Wirtz v. Young Electric Sign Co.*, 315 F.2d 326 (10th Cir. 1963).[6]

The ruling of the District Court, believing that the pre-trial conference was an adequate substitute for the hearing requirements of Rule 56(c), and the affirmance of that ruling by the 5th Circuit Court of Appeals, appear to be in conflict with the positions of other circuits on the matter, thus illustrating the necessity of this Court, in its exercise of its supervisory function over the federal judicial system, reconciling the conflict and announcing the proper rule.

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[6] The 10th Circuit Stated in *Wirtz v. Young Electric Sign Co.*, 315 F.2d 326 (10th Cir. 1963):

> Compliance with Rule 56 is the desirable procedure for consideration of summary disposition and gives the parties full opportunity for understanding of the basis of judgment. Although the appropriateness of summary disposition may be indicated as the result of a pre-trial conference held under Rule 16, this rule contemplates further procedural steps before final disposition.

Rule 56(c) is not merely a procedural nicety. It embodies at its core the concept that a litigant not only deserves but must, as a matter of due process and equity, have an opportunity to be heard before action is taken against him. To the extent the District Court did not follow the rule in this case, justice and due process have been denied.

Respectfully submitted,

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APPENDIX A

In the United States District Court for the
Southern District of Florida

PALM BEACH BILTMORE, INC.

versus No. 74-1096-Civ-PF

BANKERS LIFE AND CASUALTY COMPANY

Filed: Dec. 17, 1974

Presented for this Court's determination is the plaintiff's PALM BEACH BILTMORE, INC., motion for partial Summary Judgment.

Plaintiff in his complaint is seeking the return of $250,000.00 deposited with the defendant in connection with the sale of certain real property owned by the defendant. It is alleged in the complaint that on August 8, 1973, Charles C. Barton entered into an agreement by which the defendant agreed to sell and convey to Barton certain real property with buildings and improvements thereon located in Palm Beach. A deposit of $100,000.00 was made at the time of execution of that agreement by Barton. The closing was to be on March 8, 1974. Subsequently, Bankers Life and Casualty Company entered into an agreement extending the time for the closing until June 8, 1974, and Barton paid an additional down payment of $150,000.00. Palm Beach Biltmore, Inc., thereafter became the assignee of all of Barton's rights under the agreement. It is the plaintiff's contention that the defendant breached the contract to purchase (specifically paragraph 19 of that agreement) by failing to take

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to be judicially determined to be terminated by a Court of competent jurisdiction. Pursuant to that provision the defendant had sixty days prior to closing within which to accomplish the aforementioned judicial termination of the lease. It is the plaintiff's contention that the defendant by failing to cause a judicial termination of the lease enables plaintiff to terminate this agreement at its option with a refund from the seller of all sums paid to it by Palm Beach Biltmore, Inc.

STIPULATED FACTS

The following is a chronology of facts stipulated to by the parties:

On *August 8, 1973*, Bankers Life and Casualty Company entered into an agreement to sell to Charles C. Barton certain real property in Palm Beach County. At the time of execution of that agreement a deposit of $100,000.00 was made by Barton. The closing was to be on *March 8, 1974*. On *January 23, 1974*, the defendant and Barton agreed to extend the time for closing to *June 8, 1974*, if Barton was to conclude on or before *March 1, 1974* that he would be unable to close the transaction on *March 8, 1974*, he was to notify the defendant of that fact and make an additional deposit in the amount of $150,000.00. On *March 1, 1974*, Charles C. Barton made the additional down payment of $150,000. By letter dated *May 29, 1974*, the purchaser notified the seller that Charles C. Barton had assigned his interest in the contract to Palm Beach Biltmore.

Company was advised that because of the failure on the part of Bankers Life to cause a [178] certain lease referred to in the contract to be judicially determined to be terminated, the proposed purchasers sought a return of the deposit of $250,000.00. Bankers Life and Casualty Company refused to return the deposit. *On June 10, 1974*, the defendant, through its counsel, replied to the plaintiff's letter of *May 29, 1974* and referred to the closing date which had been attended by the defendant on Saturday, June 8, 1974, but had not been attended by the plaintiff, taking the position that the defendant was entitled to retain the entire $250,000.00 as liquidated damages.

Plaintiff's position in its motion for a partial Summary Judgment is that paragraph 19 on page 12 of the original lease agreement is clear in that it recites that at the time of the execution of the agreement, the parties were aware of a lease on certain properties being purchased. Colonnades, Inc., was the lessor and Mr. T's Clubs, Inc. was the lessee. Further, paragraph 19 provides that the purchaser at the time of the execution of the agreement knew that the lease was in default and that the demised premises were being operated by a receiver appointed by the Court in the Circuit Court Cases No. 72C-1779, *Colonnades, Inc. v. Mr. T's Yacht Club, Inc., et al.*, and No. 72C-1780, *Colonnades, Inc. v. Mr. T's Clubs, Inc., et al.*, Palm Beach County. Plaintiff relies on that portion of paragraph 19 that provides that the seller Bankers Life and Casualty Company agrees to take such steps as are necessary

minated by a court of competent jurisdiction, and if the seller does not accomplish this by sixty days prior to the date of closing, the purchaser at his sole option may terminate the purchase agreement and the seller shall return to the purchaser all sums paid to it by the purchaser. It is plaintiff's position [179] that a receiver was appointed to operate the cocktail lounge at the leased premises on November 2, 1972, and that the receiver, or his successor, appointed on June 29, 1973, has continued the operation of the leased premises and has made monthly reports of the receivership through August of 1974, and there has been no order by the Circuit Court of Palm Beach, or any other order by a court of competent jurisdiction which has determined the lease to be terminated.

The defendant's position, on the other hand, is that the plaintiff did not timely exercise the paragraph 19 option and failed to show up at the time and place for closing thereby waiving any rights that plaintiff might have had to proceed under the contract. Defendant in its opposition to plaintiff's motion for partial Summary Judgment admits that in State Court suit 72C 1780 that there is no express order of the Court holding in so many words that the lease has been terminated but maintained that the wording of paragraph 13 of the lease, coupled with the Order of the Circuit Court dated November 2, 1972, appointing a receiver constituted a *termination* of the lease. Paragraph 13 of the lease between Colonnades, Inc. and Mr. T's Clubs, Inc. provides in essence that the lessor may at its op-

tion cancel the lease if the lessee shall become insolvent or if bankruptcy proceedings shall be begun by or against the lessee, before the end of the lease.

It is the opinion of this Court that the purchaser, pursuant to paragraph 19 of the August 8, 1973 agreement, has absolute right of cancellation if the seller has not caused the subject lease to be judicially determined to be terminated sixty days prior to closing. Furthermore, the agreement entered into on January 23, 1974 (Plaintiff's Ex. "B") extending the contract to purchase in no way effected the sixty day prior to closing "cure" date. Paragraph 2 of that amendment extending the time for [180] supplying the title policy specifically states in pertinent part that, "all dates pertinent to the status of that title (e.g., objections, curing defects, etc.) shall be computed from that time (March 1, 1974)." Hence, the purchaser has the right to revoke the entire transaction right up to the closing date of June 8, 1974 and, in fact, the purchaser exercised that right by letter dated May 29, 1974.

The defendant relies on the November 2, 1972 Order of the Circuit Court of Palm Beach County appointing a receiver pending the Sheriff's sale, yet the defendant is in agreement that the receiver has thereafter continued operating the establishment and filing reports even as of the date of this Order. (It should be noted that the receiver was authorized by Court Order in June 1974 to enter into new [illegible]

[180] *Order Granting Summary Judgment and Final Judgment*

This Court is unimpressed with the defendant's position concerning the issue of waiver. There is a serious question whether this issue was ever properly raised in the pleadings. However, based upon the stipulated facts, this Court holds as a matter of law that the issue of waiver does not apply. It is uncontradicted that the plaintiff's sought to exercise their right of cancellation prior to the June 8, 1974 closing date as provided in paragraph 19 of the August 8, 1973 agreement, and it is the opinion of the Court that their exercise was valid and proper under the terms of the aforementioned agreement. The plaintiff's notification to the defendant effectively cancelled the agreement and, accordingly, plaintiff was under no obligation to be present at the closing on June 8, 1974.

At the pretrial conference, the parties agreed that there were no factual issues in dispute for a jury determination. [181] By agreement and order at the pre-trial conference, both parties had until December 11, 1974 to supplement the record, present any matters that should be submitted to a jury for a factual determination or file legal memoranda. Nothing has been filed.

Accordingly, this Court is ruling as a matter of law, based upon the stipulated facts, that the plaintiff is entitled to the return of all sums paid by way of "deposit", together with interest and costs from the date of this judgment.

Final Judgment be, and the same is, hereby entered in favor of the plaintiff, PALM BEACH BILTMORE, INC., and shall have and recover from the defendant,

Order Striking Claim [182]

BANKERS LIFE AND CASUALTY COMPANY, the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00).

Costs shall be taxed upon appropriate motion. Execution shall not issue until further Order of this Court.

DONE AND ORDERED at Miami, Florida this 17th day of December, 1974.

/s/ PETER FAY
UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1308
Summary Calendar*

DO NOT PUBLISH

PALM BEACH BILTMORE, INC.,

Plaintiff-Appellee,

versus

BANKERS LIFE AND CASUALTY COMPANY,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida

(July 17, 1975)

Before COLEMAN, AINSWORTH and SIMPSON, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5 Cir.; See *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See *NLRB v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

APPENDIX C

UNITED STATES COURT OF APPELSA

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE 504-529-6154

OFFICE OF THE CLERK

November 3, 1975

TO ALL COUNSEL OF RECORD:

No. 75-1308 - Palm Beach Biltmore, Inc. vs.
Bankers Life and Casualty Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 14, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk

by /s/ Susan M. Gravois
Deputy Clerk

cc: Mr. Robert C. Burns
Mr. James E. Tribble